APPEAL NO. 033142
FILED JANUARY 16, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 31, 2003. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and that he did not have disability because he did not sustain a compensable injury. In his appeal, the claimant asserts error in those determinations. In its response, the respondent (self-insured) objects to a medical report attached to the claimant's appeal and otherwise urges affirmance.

DECISION

Reversed and rendered.

The claimant attached to his appeal a medical record, which was not admitted into evidence at the hearing. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. *See generally* Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Appeal No. 93111, *supra*; Black, *supra*. Upon our review, the evidence offered is not so material that it would probably produce a different result, nor is it shown that the documents could not have been obtained prior to the hearing below. The evidence, therefore, does not meet the requirements for newly discovered evidence and will not be considered on appeal.

The facts of this case are largely undisputed. The claimant is employed as a prison guard. The claimant testified that on _____, he was walking down a hall counting inmates when his left ankle "rolled" as he put his weight on it. The hearing officer determined that the claimant was in the course and scope of his employment at the time the injury occurred, and that as a result of the injury sustained, the claimant has been unable to obtain and retain employment at wages equivalent to his preinjury wage from _____, through the date of the hearing.

The hearing officer relied on Employers' Casualty Company v. Bratcher, 823 S.W. 2d 719 (Tex. App.-El Paso 1992, writ denied) in concluding that the claimant did not sustain a compensable injury. The hearing officer stated:

> The claimant herein was not exposed to the risk of injury by his employment. The claimant could have been at home, in the grocery store,

> walking across a parking lot, or anywhere else and would have encountered the same magnitude of risk as he did at the time of his injury. The instant case is one of the rare occasions where an injury occurs while and employee is in the course and scope of employment but does not arise from the employment. The inevitability of the injury due to the personal defect in the claimant's ankle is totally unrelated to the employment or the demands thereof and it neither arises from the employment nor is it compensable under the [1989] Act.

We have previously rejected the very rationale upon which the hearing officer decided this case. We first note that it is well settled that an employer takes an employee as it finds him or her for purposes of workers' compensation, "defects" and all. S*ee* Texas Workers' Compensation Commission Appeal No. 981309, decided July 31, 1998. In addition, we cannot agree that the evidence supports the hearing officer's determination that it was "inevitable" that the claimant would sustain an ankle injury and, as such, the hearing officer's reliance on Bratcher is strained. We have also rejected the notion that because an injury could have occurred at a location other than the employer's place of business, it becomes noncompensable. In Texas Workers' Compensation Commission Appeal No. 012376-s, decided November 14, 2001, we stated:

> We reject the contention that a worker who is injured while performing a work-related activity at the employer's premises assumes the further burden of proving that the activity in which he or she was at the moment engaged does not parallel one that could have occurred outside of employment, or that an underlying instability was not in some respect a cause of the accident . . .. In many, if not most, instances an accident could either occur at work or away from work, and as a result, the fact that an accident could have occurred at some other location does not mean that an on-the-job injury becomes noncompensable under the positional risk test.

In the instant case, it is undisputed that the claimant was performing his job duties at the time he sustained his injury. The fact that he may have had an underlying "defect" in his ankle or that the injury could have occurred anywhere, is not dispositive. If those factors were dispositive, it would have the effect of the worker "moving in and out of the course and scope of his employment throughout the workday depending on whether the activity undertaken is one which could also be undertaken elsewhere." Appeal No. 012376-s, *supra*.

We reverse the hearing officer's determination that the claimant did not sustain a compensable injury on _____, and did not have disability and we render a new decision that the claimant did sustain a compensable injury on _____, and that he had disability from _____, through the date of the hearing.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

RON JOSSELET, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.

For service by mail the address is:

RON JOSSELET, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge